Supreme Court, U.S.
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In The

Supreme Court of the United States

MASTER SERGEANT (E-7)
PHILIP E. FROST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Armed Forces

PETITION FOR WRIT OF CERTIORARI

PHILIP E. FROST
5771 Cal-Kolola Rd.
Caledonia, MS 39740
(662) 356-6104
e-mail: frostone@ebicom.net
Pro Se

March 2003

26 pp

QUESTION PRESENTED

Whether Trial Counsel violated the Petitioner's rights that are afforded to him by the Fifth Amendment of the United States Constitution and committed reversible error during findings argument when he made the following prejudicial statement: "What's the evidence? The evidence you heard is the sworn testimony of Rachael Kinzler. You heard nothing to contradict that." Then, after being instructed by the military judge on how the burden of proof belongs to the prosecution, Trial Counsel made the statement: "You've heard no evidence to impeach Rachel Kinzler." Amendment V of the United States Constitution states, "No person . . . shall be compelled in any criminal case to be a witness against himself." The question that is presented is whether Trial Counsel violated Petitioner's rights not to testify by making inappropriate comments during argument.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Master Sergeant Phillip E. Frost, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Air Force Court of Criminal Appeals entered in his case on November 16, 2001 and issue three of the petition that was not reviewed by the United States Court of Appeals for the Armed Forces on December 16, 2002.

OPINIONS BELOW

The order and judgment of the United States Air Force Court of Criminal Appeals, ACM 33817 and the order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Master Sergeant Philip E. Frost*, USCA Dkt. No. 02-0180/AF, is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on December 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that, "No person . . . shall be compelled in any criminal case to be a witness against himself."

The case *Lent v. Wells*, 861 F.2d 975 (6th Cir. 1988), has been used as authority in cases such as this. That court determined that one should consider certain factors when a decision of harmless error is to be made:

1) Whether the language used was "manifestly intended" as comment on the failure of the appellant to testify or was of such a character that the members would "naturally and necessarily" take it as such;

2) Whether the improper comments were isolated or extensive;

3) Whether evidence of guilt is overwhelming; and

4) Whether curative instructions were given, and when.

When applying these factors on the Government's comments about the Petitioner's failure to testify, Petitioner's right not to testify was constitutionally violated and was not harmless error as the Government contends. The Government ignored the military judge's ruling that it was prohibited from commenting on Petitioner's right not to testify. The Government's repeated comments demonstrate that not only was this not an isolated incident but it mocked the military judge. The harm from what was said was a constitutional violation of the Petitioner's rights.

STATEMENT OF THE CASE

On July 2 and 3, 1999, the Petitioner was tried by a general court-martial composed of a military judge and a

jury of five officers. The Petitioner pled not guilty to two charges of an indecent act under Article 134 and two charges of indecent language under Article 134. The Petitioner was found guilty of one charge of an indecent act and one charge of indecent language under Article 134.

On November 16, 2001, the United States Air Force Court of Criminal Appeals considered six issues for review. The fifth issue will be presented here to this Honorable Court.

V

WHETHER TRIAL COUNSEL COMMITTED REVERSIBLE PLAIN ERROR DURING FINDINGS ARGUMENT WHEN HE MADE PREJUDICIAL INFERENCES THAT THE ONLY EVIDENCE THE MEMBERS HEARD WAS THE TESTIMONY OF RACHEL KINZLER WHICH WAS NOT CONTRADICTED BY APPELLANT.

On June 3, 2002, the United States Court of Appeals for the Armed Forces granted review of this case. They did not review the aforementioned error, but it was an issue put before them. Instead, they reviewed the following issue.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS' APPLICATION OF ARTICLE 66(C), UCMJ, VIOLATES *UNITED STATES V. TURNER*, 25 M.J. 324 (C.M.A. 1987).

On December 16, 2002 the United States Court of Appeals for the Armed Forces affirmed the decision of the lower court, citing that the decision of the lower court was based on correct standards of review contained in *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002), and *United States v. Sills*, 56 M.J. 239 (C.A.A.F. 2002), and

United States v. Turner, 25 M.J. 324 (C.M.A. 1987). This court did not address Petitioner's right not to testify in specification three in the review.

> WHETHER TRIAL COUNSEL COMMITTED REVERSIBLE ERROR DURING FINDINGS ARGUMENT WHEN HE MADE PREJUDICIAL INFERENCES THAT THE ONLY EVIDENCE THE MEMBERS HEARD WAS THE TESTIMONY OF RACHEL KINZLER, WHICH WAS NOT CONTRADICTED BY APPELLANT.

In *United States v. Turner* and *United States v. Edwards* it is confirmed that the accused has the right not to testify and that right is protected by the Fifth Amendment of the United States Constitution. It is improper for a prosecutor to ask the court members to infer guilt because an accused has exercised his constitutional rights. See *United States v. Turner*, 39 M.J. 259, 262 (C.M.A. 1994) (improper to comment on appellant's refusal to consent to search); (improper to comment on exercise of right to remain silent); *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992). Trial Counsel made two statements during the *United States v. Frost* court-martial. The first violation, during findings argument, Trial Counsel said, "What's the evidence? The evidence you heard is the sworn testimony of Rachel Kinzler. You heard nothing to contradict that." R.213. The Defense Counsel immediately objected and the objection was sustained. Then the military judge instructed the jurors as follows:

> "You've heard the evidence of Rachel. That's as far as counsel can go in commenting to that effect. There's no burden upon the defense to produce any evidence at all in this case. I'll instruct you further on that concept."

The second violation came immediately after this instruction by the judge. Trial Counsel proceeded to argue, "You've heard no evidence to impeach Rachel Kinzler." R.214. No other instruction by the military judge was offered to the jury or Trial Counsel on this second prohibited prejudicial statement. This was impermissible and obvious error, which was prejudicial to the Petitioner's right under the Fifth Amendment not to testify. "Trial Counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense", *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991). The Trial Counsel's comments in argument impermissibly and prejudicially conveyed to the jurors that the burden of proof rested with the Petitioner in this case. His comments effectively told the jurors they should find the Petitioner guilty because the Petitioner had offered no evidence to disprove Rachel Kinzler's allegations. The Constitution protects persons accused by the Government of crimes from this impermissible and prejudicial tactic.

REASONS FOR GRANTING THE WRIT

An important federal question that this honorable Court should address is whether the Petitioner's rights under the Fifth Amendment of the United States Constitution were violated. Petitioner has demonstrated sufficient evidence of prejudicial violation of his rights to warrant. This honorable Court should grant the writ of certiorari to review the questions presented and determine whether Petitioner's remaining conviction must be set aside because of the rights violation at his trial.

CONCLUSION

The decision of the United States Air Force Court of Criminal Appeals is in conflict with the United States Constitution, Fifth Amendment. I, the Petitioner, respectfully ask that this Honorable Court find that, consistent with the Fifth Amendment, the errors at trial of *United States v. Frost* were harmful errors constituting a violation of my rights and set aside the remaining conviction adjudged in my case.

The Petitioner therefore respectfully requests that this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

PHILIP E. FROST
5771 Cal-Kolola Rd.
Caledonia, MS 39740
(662) 356-6104
e-mail: frostone@ebicom.net
Pro Se

March 2003

APPENDIX A

U.S. v. Philip E. FROST.

No. 02-0180/AF.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

2002 CAAF LEXIS 1668

December 16, 2002, Decided

PRIOR HISTORY:

CCA 33817. *United States v. Frost*, 2001 C.C.A. LEXIS 303 (A.F.C.C.A. Nov. 16, 2001).

DISPOSITION:

AFFIRMED.

OPINION:

On further consideration of the granted issue in light of *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002), and *United States v. Sills*, 56 M.J. 239 (C.A.A.F. 2002), we conclude that the decision of the lower court was based on correct standards of review contained in *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Accordingly, it is ordered that the decision of the United States Air Force Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant PHILIP E. FROST
United States Air Force

ACM33817

16 November 2001

Sentence adjudged 2 July 1999 by GCM convened at Dyess Air Force Base, Texas. Military Judge: J. Jeremiah Mahoney.

Approved sentence: Bad-conduct discharge, confinement for six months, and reduction to E-3.

Appellate Counsel for Appellant: Frank J. Spinner (argued), Colonel James Wise, Lieutenant Colonel Timothy W. Murphy, Lieutenant Colonel Brandon A. Burnett and Captain Patience E. Schermer.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rodgers, Lieutenant Colonel William B. Smith, Major Lance B. Sigmon, Major Eric D. Placke, Major Bryan T. Wheeler, and Captain Matthew J. Mulbarger.

Before

STARR, BURD, and HEAD
Appellate Military Judges

OPINION OF THE COURT

STARR, Senior Judge

A general court-martial consisting of officer members convicted the appellant, contrary to his pleas, of one specification of indecent acts upon a child and one specification of communicating indecent language to two children, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The members acquitted the appellant of another specification of indecent acts with a child and another specification of indecent language. The convening approved the adjudged sentence of a bad-conduct discharge, confinement for 6 months, and reduction to E-3.

Before this Court, the appellant claims: (1) The military judge erred in denying a defense discovery motion; (2) The judge erred in denying a defense motion for the appointment of a defense investigator; (3) The trial counsel's findings argument violated the appellant's right not to testify; (4) The evidence is legally and factually insufficient to support the conviction for indecent acts upon a child (Specification 2 of the Charge); (5) The evidence is legally and factually insufficient to support the conviction for indecent language to children (Specification 4 of the Charge); and (6) Under *United States v. Gorski,* 47 M.J. 370 (1997), the appellant is entitled to money erroneously taken from him before the convening authority acted. The government concedes the final issue. We agree with the appellant that his conviction for indecent language to children cannot stand, and therefore set aside and dismiss Specification 4 of the Charge. We affirm the appellant's conviction for indecent acts upon a child. After reassessing the sentence in light of our action, we affirm the adjudged and approved sentence.

BACKGROUND

In May 1994, the appellant, a married technical sergeant permanently assigned to Dyess Air Force Base (AFB), Texas, became romantically involved with Joyce, while on an extended temporary duty (TDY) assignment at Ellsworth AFB, South Dakota. He spent most weekends and some weeknights at her home in Rapid City, which was also shared by Joyce's three daughters, 12-year-old RK and her 5 and 16-year-old sisters. The appellant essentially injected himself as the "man of the house," and although Joyce knew the appellant had a wife and children in Texas, her daughters did not. The arrangement abruptly ended in late Summer 1994 when the appellant's TDY was completed and he returned to Dyess and his family. Communication between the appellant and Joyce gradually dwindled and by 1998 there was none between them. On Labor Day 1998, Joyce, RK, and RK's older sister were discussing RK's father and Joyce's past boyfriends. RK became emotional and asked Joyce if she knew why she (RK) did not like the appellant. Joyce asked why and RK answered that he had "molested" her. This launched the investigation that ultimately resulted in the appellant's trial by general court-martial and his conviction for indecent acts upon RK and indecent language to RK and her five-year-old sister.

THE MOTION TO COMPEL DISCOVERY

During the initial Article 39(a), UCMJ, session, the defense moved for the military judge to order the production of a Social Security disability claim pertaining to RK. The alleged offenses occurred during the Summer of 1994. While preparing for trial, the defense came into possession of a document reflecting that in September 1994 Joyce had

filed a Social Security disability claim on behalf of RK. The defense could discern nothing else about it from the materials that were disclosed, but believed the claim might be related to the alleged offenses and hence might contain pertinent reports and test results. The trial counsel, maintaining there was no connection between the claim and the alleged offenses, refused to provide the defense with any additional information; and the matter was litigated before the military judge.

On the motion, Joyce testified that RK had been born without sight in one eye, causing her to require a special and expensive lens in her eyeglasses. She testified that in 1994 she had lost her insurance coverage and had filed the claim in hopes of receiving income for RK through Social Security based on RK's condition. She testified that the claim was disapproved, that she did not pursue it, and that no reports or tests of any kind were generated by the claim. The military judge denied the motion.

According to the appellant, the judge should have examined the requested material in camera before denying the motion, and his ruling deprived the appellant of his right to prepare and present an adequate defense. We review a military judge's decision to deny a defense request for discovery for an abuse of discretion. *United States v. Pinson,* 54 M.J. 692 (A.F. Ct. Crim. App. 2001). The key question when discovery is denied is whether the information that was not disclosed was material to the preparation of the defense. *United States v. Figueroa,* 55 M.J. 525, 528 (A.F. Ct. Crim. App. 2001). The question of materiality is a question of law and is therefore reviewed de novo. *United States v. Morris,* 52 M.J. 193, 198 (1999).

Applying these standards to the requested Social Security disability claim, we find no abuse of discretion, and we find the requested information not material to the preparation of a defense. Joyce's testimony, neither refuted nor impeached in any way, conclusively established that the claim had absolutely nothing to do with this case. Following Joyce's testimony, the defense did not even take the opportunity to argue the issue prior to the judge's recessing to decide the motion, which is telling evidence of its merit in the eyes of the defense team. The defense likewise did not request an in camera review of the disability claim. Although it was within the military judge's discretion to sua sponte conduct such a review, and while we agree with the appellant that the inclusion of the claim as a sealed exhibit would aid appellate review, the judge did not abuse his discretion by not doing so. Clearly, RK's eyesight was not even remotely connected to any issue in this case, and her mother's testimony dispelled any notion of the possible existence of any related reports or test results. *See generally United States v. Briggs,* 48 M.J. 143 (1999). We therefore reject this assertion of error.

THE REQUEST FOR A DESENSE [sic] INVESTIGATOR

Following referral of charges, the defense twice sought investigative assistance from the convening authority. According to the defense, the Air Force Office of Special Investigations (AFOSI) had inadequately investigated the case, focusing only on the appellant and not on the alleged victim and her family. These requests were denied following a finding by the convening authority that no unique or unduly burdensome tasks existed that required skills not possessed by the defense team. The defense did not renew

its request before the military judge. The appellant claims error before this Court.

A request for investigative assistance is first submitted to the convening authority. If denied, it may then be renewed before the military judge as a motion for appropriate relief. *See* Rule for Court-Martial (R.C.M.) 703(d) and 906(b)(7). Such a motion must be addressed to the military judge before the entry of a plea or, absent good cause, it is "waived" under R.C.M. 905(b)(4) and 905(e). In absence of plain error, the appellant has, by not raising this issue before the military judge, forfeited the issue at the appellate level. *Cf. United States v. Hill,* 46 M.J. 567, 573 (A.F. Ct. Crim. App. 1997). We do not find plain error. The issue has not, therefore, been preserved for appellate review.

THE TRIAL COUNSEL'S FINDINGS ARGUMENT

Two witnesses testified during the findings portion of the trial – RK for the prosecution and a clinical/forensic psychologist for the defense. Barely into the trial counsel's findings argument, the following occurred:

> CTC: What's the evidence? The evidence you heard is the sworn testimony of [RK]. You've heard nothing to contradict that.
>
> CIV DC: Your Honor, we're going to object to that.
>
> CTC: It's a fair inference on the evidence, your Honor.
>
> MJ: The objection is *sustained* (emphasis added). You've heard the evidence of [RK]. That's as far as counsel can go in commenting to that effect.

> There's no burden upon the defense to produce any evidence at all in this case. I'll instruct you further on that concept. Is that satisfactory?
>
> CIV DC: Could I have the specific objection after we get through with arguments, preserve that until later?
>
> MJ: Yes.
>
> CTC: You've heard no evidence – may I continue, your Honor?
>
> MJ: Go ahead.
>
> CTC: You've heard no evidence to impeach [RK]. . . .

The trial counsel then completed his argument, followed by the defense argument and prosecution rebuttal argument. The military judge then instructed the members, closed the court, and conducted an Article 39(a) session on the objection. The following discussion the [sic] occurred:

> CIV CD: I just wanted to make a specific objection that I reserved earlier. It was a comment on the part of the prosecution for the defendant not testifying, violating his constitutional rights.
>
> MJ: In other words, you're objecting to the statement that [RK's] testimony was unrebutted?
>
> CIV DC: Yes.
>
> MJ: What about that?
>
> CTC: Your Honor, it was not an impermissible comment on the accused's decision not to testify. In fact, that comment didn't go to that. The comment went to the fact that she didn't retract it from herself on cross-examination, that the expert

didn't rebut it. It wasn't a comment at all on the defense's decision not to call any live witnesses. It doesn't go that far.

MJ: Well by her testimony, the only person present on one of those two occasions, other than herself and the accused, was asleep. So there would have been no other eyewitnesses besides [RK], except for the accused, right?

CTC: Or [RK], that's correct, sir.

MJ: So if her testimony is unrebutted, or if it's stated that it's unrebutted, that raises an inference that's pointed out by [CIV DC] that the argument is a comment on the fact that the accused has not chosen to testify.

CTC: It wasn't intended to do that. I think your curative instruction sufficed that. It was intended to state that [RK] never recanted that, that she stuck with her story. So she would be one of the witnesses available.

MJ: Well that inference could have been drawn from the argument. I believe the prompt objection and my preliminary instruction, coupled with the final findings instructions, adequately dealt with it. So the objection is *overruled* (emphasis added). Do you have any motion?

CIV DC: No, your Honor.

According to the appellant, the military's judge's curative instruction regarding the trial counsel's first remark was insufficient to cure the error, while the second remark (no evidence to impeach RK) amounted to plain error. We, however, view the civilian defense counsel's objection to the initial remark and his request to later make a more complete record of the objection as sufficient

to preserve the issue as to both remarks. We therefore decline to conduct a plain error analysis. *United States v. Mobley,* 34 M.J. 527, 529-30 (A.F.C.M.R. 1991), *aff'd* 36 M.J. 34 (C.M.A. 1992); *See also United States v. Shepard,* 38 M.J. 408, 413 (C.M.A. 1993).

Even if the trial counsel's remarks constituted error, and we do not believe they did, the error was clearly harmless under the circumstances of this case. *United States v. Dennis*, 39 M.J. 623, 625 (N.M. Ct. Crim. App. 1993), *aff'd* 40 M.J. 305 (C.M.A. 1994); *See also United States v. Saint John*, 48 C.M.R. 312 (C.M.A. 1974). First, the trial counsel's remarks were not "manifestly intended" as comments on the appellant's decision to testify, nor were they of such a character that the members would naturally take them as such. Second, the comments were isolated, appearing only twice in an argument that occupies over seven pages of transcript. Third, as we discuss in the following section, the evidence of the appellant's guilt is overwhelming on the indecent acts upon a child specification. Fourth, the judge provided a sufficient curative instruction immediately following the initial comment and immediately preceding the second comment. Finally, the military judge's pattern instructions, addressing the presumption of innocence and the appellant's right not to testify re-enforced his curative instruction. *See generally Mobley,* 34 M.J. at 531-32. Given these factors, we are persuaded beyond a reasonable doubt that, even in the absence of the comments, the members would have convicted the appellant of the indecent acts upon a child specification. We therefore reject this claim of error.

FACTUAL AND LEGAL SUFFICIENCY

The appellant attacks both of his convictions on legal and factual sufficiency grounds. It is clear, however, from the brief and from oral argument that his theory on the indecent language specification is grounded in legal sufficiency, while his theory on the indecent acts specification is grounded in factual sufficiency. As to the indecent language conviction, the appellant claims the words spoken do not, under the circumstances, rise to the level of actionable indecent language. As to the indecent acts conviction, the appellant claims we should not believe RK, essentially because of prior inconsistent statements and her motive to fabricate as explained by the clinical/forensic psychologist.

This Court has a duty to determine the legal and factual sufficiency of the evidence. Article 66(c), UCMJ. We may approve only those findings of guilt that we determine are correct in both law and fact. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the judges of this Court are convinced beyond a reasonable doubt of the appellant's guilt. *Turner,* 25 M.J. at 325. In *United States v. Washington,* 54 M.J. 936, 940 (A.F. Ct. Crim. App. 2001), however, this Court observed that Congress clearly intended the service courts of criminal appeals to affirm the trial court's factual findings if the weight of the credible evidence for conviction

outweighed that for acquittal. *See also United States v. Nazario,* ACM34221 (A.F. Ct. Crim. App. 19 Oct 2001).

RK testified that one evening during the summer of 1994, the appellant, Joyce, and all three girls were in the kitchen when the appellant remarked, "Your mom has big tits, I guess you guys will too." Everyone present heard the remark. Joyce did nothing other than look at the appellant, who "laughed" after saying it. RK thought it was "disgusting." She testified the appellant commonly used such language around the family. The older daughter likewise routinely used crude language around the appellant. There was no evidence of record these practices were of any particular concern to Joyce. Two specifications were referred based on this comment, one alleging indecent language toward the 16-year-old daughter, and one alleging indecent language to the children referring to RK and her 5-year-old sister. The members acquitted the appellant of the specification involving the 16-year-old, but convicted him of indecent language to the younger children.

Indecent language is defined as "that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." *Manual for Courts-Martial, United States, (MCM),* Part IV, ¶ 89 (1998 ed.). Not every crude and disgusting remark in the presence of a child qualifies as actionable indecent language. "The test is whether the particular language is *calculated* to corrupt morals or excite libidinous thoughts." *United States v. Brinson,* 49 M.J. 360, 364 (1998) (quoting *United States v. Linyear,* 3 M.J. 1027, 1030 (N.C.M.R. 1977)) (emphasis added). Not only the words themselves, but the surrounding circumstances must be taken into account. *United States v. French,* 31 M.J. 57, 60 (C.M.A.

1990). Given the verbal dynamics of this particular group, and the circumstances under which the remark was made, we find the appellant's remark, while vulgar and tasteless, legally insufficient to constitute actionable indecent language to children. *See generally United States v. Hullett,* 40 M.J. 189 (C.M.A. 1994). We therefore set aside the appellant's conviction on this specification and dismiss it.

With regard to the indecent acts specification, RK testified that one night, while she and her little sister were home alone with the appellant and her sister lay asleep on the floor, the appellant asked her to sit with him on the couch while they watched TV. She did, and he then asked her to lie down. Again she complied, and he lay behind her. The appellant began rubbing RK's hair and scratching her back. He then began rubbing her stomach and then moved his hand to her chest area. The appellant asked RK if she liked it but she did not give him a "straight answer." According to RK, the appellant then "went down into my underwear and started rubbing there." RK then told the appellant she had to go to bed and left the room.

The defense presented the testimony of one witness, a clinical/forensic psychologist, who conducted an extensive analysis of the allegations, focusing on the AFOSI investigation of the case and on the dynamics of RK's family history. (He interviewed RK's older sister, but Joyce would not permit him to interview RK). He also examined the appellant's history and interviewed both the appellant and several people who knew him. The psychologist concluded that aspects of the AFOSI investigation were troubling and that certain factors supported the argument that RK's memory had evolved over time. He nonetheless also concluded that given the totality of the circumstances of the case, the nature of the sexual abuse reported by RK

was "reasonably probable" and that the appellant possessed several "risk factors" that bolstered RK's credibility.

We have carefully examined RK's testimony as well as the defense expert's comprehensive analysis of the case presented during his testimony. Having done so, we make two observations. First, the members no doubt paid careful attention to the entirety of the testimony, and likely acquitted the appellant of a second specification alleging an earlier indecent act upon RK for the very reasons the appellant now advances. Secondly, regarding the indecent acts, RK's testimony is both clear and credible and is not put into substantial doubt by the expert's testimony. The evidence supporting the appellant's conviction for indecent acts upon then 12-year-old RK is both legally and factually sufficient under *Turner.* If we were to apply the standards of factual sufficiency discussed in *Washington* and *Nazario,* we would also affirm the appellant's conviction for indecent acts upon RK.

THE REMEDY

We affirm the appellant's conviction under Specification 2 of the Charge, indecent acts upon a child. We set aside the appellant's conviction under Specification 4 of the Charge, indecent language to children, and we dismiss that specification. If a Court of Criminal Appeals determines that a finding of guilty should not be affirmed, the appellant's sentence is subjected to analysis under the principles announced in *United States v. Sales,* 22 M.J. 305 (C.M.A. 1986). *United States v. Riley,* 55 M.J. 185, 190 (2001). This Court may reassess the sentence instead of ordering a sentence rehearing if we are convinced that the sentence "would have been at least of a certain magnitude"

absent the error, or in this case absent the conviction which is being set aside. *Sales,* 22 M.J. at 307. *But see United States v. Sills,* ACM 34323 (A.F. Ct. Crim. App. 18 Oct 2001). We are confident we can reassess in this case.

As is clear from the trial counsel's sentencing argument, the indecent language conviction played only a minor role in the appellant's case. The entire thrust of the sentencing argument was on the "crime" the appellant perpetrated on RK. In an argument spanning three pages of transcript, the trial counsel mentioned the indecent language specification only once in passing. He then focused on: "[T]he most important thing. That's the crime he committed against [RK]." He argued:

> [RK] has to deal with this for the rest of her life, for the rest of her life. She's had to deal with it for the last five years without telling anybody, keeping it hidden, bearing the burden by herself. She'll carry it with her when she has a boyfriend. She'll think about it when she gets married. She'll think about it if she decides to have children. The rest of her life she'll have to carry this.

In sum, this is a case about indecent acts, not indecent language. We are convinced that the members' sentence, absent the conviction we now set aside, would have been no different than that adjudged. After carefully reviewing the entire record, and after reassessing the sentence, we are convinced that the appropriate sentence in this case is a bad-conduct discharge, confinement for six months, and reduction from E-7 to E-3. *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982).

The government concedes error in the collection of automatic forfeitures from the appellant before the convening authority acted. Because the appellant's offense occurred before 1 April 1996, any such automatic forfeitures were collected in contravention of *United States v. Gorski,* 47 M.J. 370 (1997), and they must be restored to him. *United States v. Dewrell,* 52 M.J. 601, 616 (A.F. Ct. Crim. App. 1999). Because the convening authority waived automatic forfeitures at the E-3 rate, however, the recovery is limited to the difference in E-7 and E-3 pay and allowances.

The appellant's conviction under Specification 4 of the Charge is set aside and dismissed. The appellant's conviction under Specification 2 of the Charge and the sentence, as reassessed, are

AFFIRMED.

[SEAL]